No. 14970.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Appellee's statement of the case adds nothing of value to the original statement by Appellant. Appellee bravely asserts that "as Appellee attempted to dispose of his second load of trash, he slipped on refuse on top of the cement edge of the retaining wall and fell between the truck and the pit." (Reply Br. pp. 2-3.) Two transcript references (pp. 46-105) are given, but neither of them support the quoted statement. The true facts with reference to the fall and its cause are fully set forth in the Opening Brief where Appellee clearly testified as to the cause of his fall.

> "Q. There was nothing on which you were standing that caused you to slip, then, was there? A. Well,

my testimony is that *because I had to pull harder* my feet slipped and then went forward. * * *

Q. Now on what did you slip? A. I think it was because I pulled hard." [Tr. pp. 87-88.]

That the *cause* of Appellee's *fall* is clearly established as being unrelated to any negligent conduct on the part of Appellant appears from a reading of the Reply Brief where it is asserted that the maintenance of the piece of broken metal on the truck body was a "trap." Appellee concedes as he must, the proposition that *an invitor owes no duty to warn an invitee of obvious defects or dangers* (Reply Br. p. 6), but courageously asserts that the protruding piece of metal was not obvious, thus the rule enunciated by a host of California cases is inapplicable.

Appellee is clearly in error. For example, assume an open unguarded excavation 20 feet wide, in broad daylight. A plaintiff inattentively falls in the excavation. Could it possibly be asserted that the person who maintained the excavation could be held liable because plaintiff struck a plank at the bottom of the ditch which had a protruding nail, but that there would be no liability if plaintiff merely injured himself by striking the ground at the bottom of the ditch? Appellant thinks not. As Appellant has already pointed out, the *hazard* was that of *falling into the pit.* The danger of injury from a fall into the pit would be apparent to *anyone.* Appellee clearly did not intend to fall into the pit. No one expected that Appellee or anyone else would attempt to use the area between the edge of the pit and the truck body and there is not one scintilla of evidence in the record to justify such a conclusion. That Appellee hit the projecting piece of metal was *mere happenstance,* nothing more.

The case must be governed by the well settled principles laid down by the many cases cited in the Appellant's Opening Brief, particularly *Blodgett v. Dyas Co.,* 4 Cal. 2d 511 and others as set forth in Opening Brief, page 13. In the *Blodgett v. Dyas Co.* case, 4 Cal. 2d 511, the plaintiff fell down an open stair well. It was held that as a matter of law there was no liability. Under Appellee's theory, if the plaintiff had fallen down the *same* open stair well which had at the bottom thereof an object which might conceivably have caused injury, there would be liability. *Clearly such a result is ridiculous.*

It is respectfully submitted that as a matter of law the uncontradicted evidence established that Appellee by his own conduct *pulled too hard* on his gunny sack and unintentionally fell into the pit, and that his injuries were not the result of any negligence on the part of Appellant. That in any event reasonable minds could not differ on the proposition that Appellee's own conduct contributed proximately to his injuries.

The evidence does not support the findings and the judgment should be reversed.

Respectfully submitted,

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Attorneys for Appellant.